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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 554

THE SCAM INSTRUMENT CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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JURISDICTION.

The judgment of the Court of Appeals was entered on May 15, 1968 (pp. 12, 17, *infra*). Rehearing was denied on June 26, 1968 (p. 18, *infra*). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED.

Whether payments received by an employee in excess of the actual cost of an illness or accident under the terms of a union negotiated hospitalization plan are terms and conditions of employment.

Whether an employer during the term of a collective bargaining agreement has an obligation to bargain with a union concerning a plan to eliminate what was an unintended aspect of insurance coverage.

STATUTE INVOLVED.

The statutory provisions involved are Sections 8(a)(1) and (5) and 8(d) of National Labor Relations Act as amended, 61 Stat. 136, as amended by 73 Stat. 519, 29 U. S. C. Sections 158 and 159. They are printed in Appendix A, p. 11, *infra*.

STATEMENT.

This case was presented to the Court of Appeals on Petition of the Board (R. 1) to enforce its Order against Scam (petitioner here) pursuant to the National Labor Relations Act, as amended (61 Stat. 136, as amended by 73 Stat. 519, 29 U. S. C., Sections 151 *et seq.*). The order of the Board resulted from the usual procedure upon charges against Scam filed by Local 1031, International Brotherhood of Electrical Workers, AFL-CIO. The Trial Exam-

iner's Intermediate Report was adopted by the Board without making any specific comments of its own, holding that Scam violated Section 8(a)(1) and (5) of the Act by unilaterally modifying the benefit payment schedule of a group health insurance policy which Scam was required to carry for its employees under its collective bargaining contract with the union. The Court of Appeals affirmed the Order entered by the Board (pp. 12, 17, *infra*).

Since May of 1955, the union has represented the production and maintenance employees in the Company's Skokie, Illinois plant. The most recent collective bargaining agreement between the parties contained a provision under which the Company agreed to provide certain designated insurance coverage for the representative employees at its own expense (J. A. 82-84).

In February of 1965, the Company and its insurance carrier agreed to the addition of a rider to the insurance policy that provided the required coverage. The rider added a "non-duplicating" provision to the medical coverage portions of the policy (J. A. 7-8; 31-32, 35-38, 85-88). The Rider provided for the coordination of benefits when there was additional group insurance coverage provided by another employer in the form of contributions by that employer and/or payroll deductions. The Rider did not provide for non-duplication of all insurance coverage, but was limited solely to the situation where there were two group insurance plans covering one employee that had been provided through an employment relationship.

During the first week of May, 1965, the union informed the Company that the union objected to the execution of the insurance rider. While the matter was under study by the Company the union filed a grievance under the provisions of the collective bargaining agreement. The parties were unable to settle their differences through the griev-

ance procedure and the union advised the Company that it wished to carry the matter to arbitration. An arbitrator was selected. However the hearing before the arbitrator was continued on different occasions and the union filed the charges against the Company, the subject matter of this instant case.

The Trial Examiner concluded that Scam had unilaterally changed existing terms and conditions of employment and thereby violated Section 8(a)(1), 8(a)(5) and 8(d) of the Act through the addition of the non-duplicating rider to the insurance contract. The Board adopted the Intermediate Report of the Trial Examiner and the Court of Appeals affirmed the Board's Order.

REASONS FOR GRANTING THE WRIT.

The question involved is one of major importance, not only to Petitioner, but also to literally thousands of other employers who provide insurance coverage to their employees through collective bargaining agreements. The proposition that an employer must bargain over the removal of an unintended dollar profit from insurance coverage is a novel one for which there is no precedent. The issue in this case is concerned with the extent to which the interpretation of "wages, hours and other terms and conditions of employment." The mandatory subjects for collective bargaining of Section 8(a)(5) of the National Labor Relations Act can be broadened to include every subject in which any employee could conceivably have an indirect interest as a result of the Court's decision. This concern over the extension of the duty to collective bargaining is not occasioned by a lack of regard for collective bargaining as a means for settling disputes, but rather, by the conviction that there must be some aspect of business or industrial life which need not pass through the crucible of negotiation with the labor union before becoming effective.

Only a little reflection is required to realize that extending the theory contained in the decision of the Court of Appeals to its logical conclusion must inevitably bring all industrial and commercial activity of unionized employees to a shuttering and chaotic halt.

Even the majority of the Supreme Court in *Fibreboard Paper Products Corp.* v. *N. L. R. B.*, 379 U. S. 203 (1964), expressed some concern over this tendency when it stated as follows in upholding a Board order:

> "We are thus not expanding the scope of mandatory bargaining to hold, as we do now, that the type of 'contracting out' involved in this case—the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of collective bargaining under Section 8(d). *Our decision need not and does not encompass other forms of 'contracting out' or 'subcontracting' which arise daily in our complex economy.*" 379 U. S. 215. (Emphasis supplied.) (Footnote omitted.)

Mr. Justice Steward in his concurring opinion in which Justices Douglas and Harlan joined, expressed even graver concern, saying:

> "The phrase 'conditions of employment' is no doubt susceptible of diverse interpretations. At the extreme, the phrase could be construed to apply to any subject which is insisted upon as a prerequisite for continued employment. Such an interpretation, which would in effect place the compulsion of the Board behind any and all bargaining demands, would be contrary to the intent of Congress, as reflected in this legislative history.
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> * * * * *
>
> "Only a narrower concept of 'conditions of employment' will serve the statutory purpose of delineating a limited category of issues which are subject to the duty to bargain collectively. * * *" 379 U. S. 221.

The Court's decision misinterpreted the obligation of Scam to provide insurance coverage. The collective bargaining agreement and the schedule of benefits attached thereto only required Scam to provide medical and hospital coverage up to a stated maximum. Scam agreed with the union to provide this coverage but there was no direction as to how the coverage was to be provided. Scam was free to change insurance carriers or to modify any contractual provision with its insurance carrier so long as the scheduled maximum coverage was provided. The duty that the collective bargaining agreement imposed upon Scam was only to provide the scheduled coverage. The addition of the non-duplication Rider in no way reduced the amount of coverage available to Scam employees, but simply eliminated the unintended dollar profit paid to a small minority of employees who had coverage for themselves or their dependents through some other group insurance contract provided by an employer other than Scam. After the addition of the Rider, the amount received by the Scam employees was not reduced below the coverage agreed upon between the Company and the Union. The Court's decision rejected Scam's contention that the issue presented was whether the elimination of the unintended dollar profit was or was not within those areas imposing a mandatory duty to bargain. The Court held that the right to add the non-duplicating Rider was not unilaterally available during the contract term. This position is inconsistent. The matter before the Court either concerned a mandatory deal to bargain, thereby prohibiting action by Scam, or it did not concern a mandatory duty to bargain, thereby allowing Scam to provide the agreed upon insurance coverage as it so determined. Matters that are not specifically covered in a collective bargaining agreement are subject to bargaining only if they come within the statutory definition of conditions of employment.

The Court's ruling is contrary to that of the Fourth Circuit in *Westinghouse Electric Corp.* v. *N. L. R. B.*, 387 F. 2d 542 (C. A. 4) at 548, 550, where the Court said in refusing to require the employer to bargain concerning increases in prices charged on coffee and meals served in the Company plant under a contract with an independent caterer:

> "In the instant case we arrive at the conclusion, one which we believe is not inconsistent with past pronouncements of this Court, that since practically every managerial decision has some impact on wages, hours, or other conditions of employment, the determination of which decisions are mandatory bargaining subjects must depend upon whether a given subject *has a significant or material relationship to wages, hours or other conditions of employment.*
>
> The case before us does not even remotely involve any question of job security or any other issue which employees could traditionally consider 'vital'. Nor is there any evidence that the inclusion of this issue here within the collective bargaining framework is a widespread industrial practice."
>
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>
> "*In the view of the majority of this Court, it was not the intent of Congress in enacting the National Labor Relations Act to sweep every act by every employer within the ambit of 'conditions of employment.'* The dissenting members of the Board pointed out, in effect, that equating the trifles here involved with subjects such as wages, hours, working conditions, job security, pensions, insurance, choice of bargaining representatives or other subjects directly and materially affecting 'conditions of employment' is sheer nonsense. Efforts to apply a theory such as the Board adopted in Weyerhaeuser to clearly inappropriate situations should be discouraged where the reasons for such attempted applications are, as charged by the petitioner, absurd and mischievous. Balanced and effective collective bargaining should be the ultimate objective. The statutory

> purpose may best be served by formulating and applying a reasonable concept of 'conditions of employment' in determining subjects of mandatory bargaining. (Emphasis supplied.)

The foregoing reasoning of the Fourth Circuit recognized a legal distinction between those subjects which have a material or significant impact on wages, hours or other conditions of employment and those which are only indirectly, incidentally or remotely related to those subjects. To fail to recognize this distinction would impose a duty upon every employer to bargain collectively over virtually every managerial decision since each to some degree has its impact upon the employees. The decision of the Court in this case contemplates "bargaining" simply for the sake of bargaining, apparently on the theory that mere discussion may serve as a valuable prophylactic. This represents a vast departure from the statutory definition of collective bargaining as interpreted by this Court. If employers and unions are bound to discuss anything and everything that either of them or any of their constituents considers an irritant simply for its therapeutic effect, then truly this decision has completely rewritten the statute. This definition of a mandatory subject for bargaining actually poses a threat to effective and meaningful collective bargaining which is a backbone of federal labor policy.

It is submitted that upon review of the record considered as a whole, as required by *Universal Camera Corporation* v. *N. L. R. B.*, 340 U. S. 474 (1951), the decision of the Court should not be allowed to stand because the windfall to the employees as a result of the unintended dollar benefit cannot reasonably be brought within the statutory term "wages, hours and terms and conditions of employment" as to Scam in this case.

There must be reasonable limits imposed upon the concept of unilateral violations to avoid a flood of inconse-

quential cases which would disrupt the proper enforcement of the Act and unduly harass employers. Since limits have not been clearly enunciated, it is important that this Court settle the question.

CONCLUSION.

For the reasons stated this petition for certiorari should be granted.

Respectfully submitted,

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September 24, 1968.